From: Nathan Myers
To: Microsoft ATR
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Subject: Microsoft settlement

Following are my comments on the court's settlement with the convicted offender, Microsoft, Inc.

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1. It appears to me that all the proposed settlements treat the company as if it had not yet been convicted. Worse, they ignore the company's prior history of consciously circumventing the spirit and letter of court orders. This is a company whose officers have frequently denied the authority of the government to control its abuses. For the outcome of this case to be useful, it must not only prevent the company from harming the nation further, it must demonstrate to Microsoft and others that the law does have teeth even where a large and wealthy corporation is involved.

2. The main public reason for limiting the severity of a sentence has been to avoid driving the offender entirely out of business, harming its employees, existing customers, and stockholders. With Microsoft's monopoly profiteering unchecked lo these many years, it is equipped with tens of billions of dollars to help it ride out any temporary inconvenience, regardless of severity. I see no practical need to mute the terms in order to allow the company to continue operating. It can afford almost anything, for years.

3. All the proposed settlements I have read were complicated and hard to administer, which probably would result in both successful circumvention and further litigation. Simplicity is essential. Furthermore, the burden of proof that the company is faithfully abiding by the terms must be on the company, not on the government(s) or the company's victims.

4. The primary means by which the company has been able to cement its monopoly has been through enforcement of exclusionary contracts. One effective means of limiting its power would be to specify broad conditions under which courts are directed to rule against the company in disputes, despite contract terms or court precedents. (The company's monopoly and deep pockets inevitably tilt the scales, despite any settlement terms; the court should artificially tilt them back.)

5. Another means by which the company has excluded competition has been to limit access to preferential prices to those who obey it (contract or no). This mechanism should be made unavailable by

requiring that all products be available to anyone at a fixed price, regardless of circumstances, with no permission to tailor a product for a particular customer. Even volume discounts tilt the field against smaller competitors; the company has no immediate need to charge smaller customers more.

6. The company has used its control of details of its products' implementations to exclude competitors. It does this both by changing existing products in undocumented ways to make them incompatible with competitors' products, and by keeping details of new products secret. Forcing the company to publish freely all details of the external behavior of their products -- their "APIs", "protocols", and "file formats" -- would reduce this threat. (Note that exceptions for "security details" have already been proven unnecessary and actually harmful to security; given such an exception, critical competitive details could easily be concealed.) The company should be prevented from releasing products until the completeness and correctness of the documentation has been established, so it has incentive to document well.

7. The company has eliminated competition by purchasing control of smaller companies that threatened to develop market share in areas it hoped to dominate. The company should be prevented from acquiring control of other companies, and should be forced to sell off subsidiaries and divisions that would place it in new markets.

8. The company has acquired a large portfolio of patents which could be used as an alternative means to exclude (at least smaller) competitors. While they appear not to have used this mechanism much yet, once other avenues of exclusion are forbidden the company will be tempted to exercise exclusionary patent rights. These patents should be released into the public domain immediately.

9. Much of the company's ability to attack markets comes from its cash reserve. This should be placed in escrow, and cash metered out for individual expenses once it is determined that they do not contribute to monopoly dominance.

10. The penalty for failure to perform up to the terms of the final settlement should be the wholesale loss of trade secret and copyright status for the affected product(s).

11. Those company officers who lied under oath and falsified evidence should immediately be prosecuted for perjury and obstruction of justice.